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REVENUE AND TAXATION IN THE MONTANA CONSTITUTION: PRESENT AND PROPOSED

by P. Bruce Harper

INTRODUCTION

Montana's present Constitution was written in 1889. Since that time the economic, political and philosophical attitudes of the people of this state have changed. Great demands are now being made of state governments that were not contemplated in 1889. Prices are higher, the standard of living is higher and citizens want comparable conveniences that only an organized body of people, i.e., a government, can provide. Normally a constitution would not, and should not impede a government's response to the needs and desires of her people. In 1955 the report of the President's Commission on Intergovernmental Relations made the following observation:

Some of the fiscal problems facing state and local governments today stem from failure of the states to remove constitutional and statutory limitations that concern their freedom of action. It is often because of these limitations that state and local governments turn to the national government for assistance. The states have restricted themselves in the use of taxing and borrowing powers, and they have earmarked revenues for specific purposes in ways that deprive legislatures and executives of budgetary control and fiscal flexibility.¹

Montana's Constitution is characteristic of the constitutions about which the report speaks. The Montana Constitution is long and greatly detailed. It is ambiguous and difficult of interpretation. The Legislative Council has said that the fiscal provisions are the most complex sections existing in the Constitution;² further, "This complexity is illustrated by extensive court cases interpreting the language."³ Many of the provisions of the Constitution are statutory in nature. The group of constitutions drafted in the late 19th century reflect the general distrust of government characteristic of the period in which they were written.⁴ Consequently, the document is more concerned "with limiting government than infusing it with strength to achieve positive goals."⁵ In 1967 the Legislative Assembly showed their concern with the failure of the 1889 Constitution to provide a progressive foundation for our state government. They noted that: (1) conditions have greatly changed since the charter was adopted; (2) the length and detail of the Montana Constitution require frequent amendment to adapt it to modern con-

¹LEAGUE OF WOMEN VOTERS, A STUDY OF THE MONTANA CONSTITUTION, Study Unit One (December 1969) citing: U.S. COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS (Washington, D.C., 1955), at 42.

²MONTANA LEGISLATIVE COUNCIL, THE MONTANA CONSTITUTION, REPORT TO THE FORTY-FIRST LEGISLATIVE ASSEMBLY, Report No. 25 (1968) at 57.

³*Id.*

⁴LEAGUE OF WOMEN VOTERS OF MONTANA, A STUDY OF THE MONTANA CONSTITUTION, Study Unit Two, (January, 1970) at 3.

⁵*Id.*

ditions; and (3) population, industrial growth and resource development create problems that are difficult to resolve under the present constitution.⁶

The objective in revising a constitution is better government. The charter should be a platform or framework within which laws may be soundly drafted and enacted to meet changing conditions. It has now been decided to have a constitutional convention. The rewriting of any article should be governed primarily by the historical experience and the current and prospective needs of the state.⁷

The purpose and goal of this comment is to analyze some sections of the present constitution in the light of judicial decisions construing them. Without a careful review of the court cases, many of the provisions of Article XII, Revenue and Taxation, are not readily understandable.⁸ Other sections will be briefly discussed. Once one is aware of the vagaries of the present article, he will be in better position to suggest changes which will fit the needs and goals of the people of Montana.

This comment is directed only to Article XII. It does not consider Article XIII Public Indebtedness. Whether or not this writer's proposal would require additional sections concerning public indebtedness must be left to others who have analyzed Article XIII and understood its purpose.

EQUALITY AND UNIFORMITY

THE EQUALITY AND UNIFORMITY CLAUSE

Article XII, Section 1: The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state.⁹

At first blush, Section 1 of the Revenue and Taxation article appears to be a grant of power by the citizens of the state to the Legislature. However, a state legislature does not act under enumerated powers¹⁰ but, rather, under inherent power. A state constitution works to restrict the power of the legislature.¹¹ State constitutions are distinguishable from the United States Constitution in this manner:

. . . The government of the United States is one of enumerated powers; the national constitution being the instrument which specifies them, and in which authority should be found for the exercise

⁶LEAGUE OF WOMEN VOTERS OF MONTANA, A STUDY OF THE MONTANA CONSTITUTION, Study Unit One, (December, 1969) at 1.

⁷BROOKE, STATE CONSTITUTIONAL REVISION CHAPTER 14 TAXATION AND FINANCE (1960 Public Administration Service) at 236.

⁸Montana Legislative Council, *supra* note 2 at 57.

⁹MONT. CONST. art. XII, § 1.

¹⁰State *ex rel* Sam Toi v. French, 17 Mont. 54, 56, 41 P. 1078 (1895).

¹¹*Id.*

of any power which the national government assumes to possess. In this respect it differs from the constitutions of the different states, which are not grants of power to the states, but which apportion and impose restrictions upon the powers which the states inherently possess. (Cooley on Const. Lim. p. 10) . . .¹²

It follows that since the state constitution is not a grant of power, it does not create the tax power which the legislature is to exercise. If Article XII were eliminated from the Constitution, the legislature could do everything it can now, and more as well.¹³ It has been held, therefore, that the two methods of taxation provided for in Section One are not exclusive.¹⁴ The legislature may adopt other methods of taxation so long as they are not prohibited by some other section of the state constitution, or the federal constitution,¹⁵ and are not in excess of necessity.¹⁶

What then is the effect of Section 1 of Article XII? The first sentence requires the legislature to assess and tax property in a manner that is "uniform" and to insure that all property has a "just valuation." Assessment is the process by which persons subject to taxation are listed, their property described, and its value ascertained.¹⁷ Taxation consists of determining the rate of the levy and imposing it.¹⁸ Taxes are levied upon persons and not upon property.¹⁹ However, the property is used to determine the amount of tax an individual must pay and, in addition, is also the security for its payment.²⁰ Of course, the power to tax is limited to subjects within the jurisdiction of the state.²¹

The equality and uniformity provision is not an absolute:²²

. . . It is a matter of common experience that absolute equality in the imposition of a tax is not attainable. Nor is this the meaning of the constitutional provision. All that it requires is an aim and an intention on the part of the legislature, in framing the tax law, to approximate to the ideal of absolute equality as closely as the nature of the subject and the necessities of practical administration will permit. . . .²³

It has been stated that absolute uniformity of taxation upon all classes of property works a hardship upon some classes of property.²⁴ The old rule, called the "uniform *ad valorem* system" was discussed and rejected in *Hilger v. Moore*.²⁵ The rule simply stated is that "if A and B each

¹²*Id.*

¹³*Hilger v. Moore*, 56 Mont. 146, 167, 182 P. 477 (1919).

¹⁴*State v. Driscoll*, 101 Mont. 348, 54 P.2d 571 (1936).

¹⁵*Id.*

¹⁶*Rogge v. Petroleum County*, 107 Mont. 36, 39, 80 P.2d 380 (1938).

¹⁷*State v. Moody*, 71 Mont. 473, 482, 230 P. 575 (1924).

¹⁸*Id.*

¹⁹*State v. Camp Sing*, 18 Mont. 128, 149, 44 P. 516 (1896).

²⁰*Id.*

²¹*Hayes v. Smith*, 58 Mont. 306, 312, 192 P. 613 (1920).

²²*Anaconda Copper Mining Co. v. Junod*, 71 Mont. 132, 140, 227 P. 1001 (1924).

²³*Id.*

²⁴*Hilger v. Moore*, *supra* note 13 at 149.

²⁵*Id.*

owned taxable property of the same value within the same taxing district, each should pay thereon precisely the same amount of tax, without reference to the character of the property."²⁶ But *Hilger v. Moore* decreed that the Constitution must be read in its entirety and that division into chapters and sections was for convenience of reference.²⁷ Since Section 11 of Article XII indicates classification of property is permissible and no other provision prohibits classification, the legislature was found to have the power to classify property for purposes of taxation.²⁸ It appeared to the court that Section 1 was borrowed from one Constitution and Section 11 from another.²⁹ The court stated: "The two provisions are not altogether harmonious, and the construction of them intended by the framers, is not very clear."³⁰ The court held that the uniform *ad valorem* rule never prevailed in Montana. Therefore, the uniformity requirement simply means that taxes must be the same or nearly so upon the same class of subjects.

The doctrine of classification seeks to "shift the burden of taxation from property, as such, to productivity, or in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens"³¹ Proper classification of property for taxing purposes will have real differences between the subjects constituting the different classes.³² There is no violation of the equal protection clause of the 14th Amendment so long as there is a real and substantial distinction between classes.³³

The uniformity provision has no application where the Constitution itself fixes value at which property shall be taxed.³⁴ In order for this provision to apply, one must find the subject of the tax to be property³⁵ and must also find that the levy imposed is indeed a tax, and not a license fee.³⁶

In *State ex rel Sam Toi v. French* the contention was that the legislation providing for laundry licenses was unequal and not uniform.³⁷ The licenses were divided into three classes: steam laundry \$15, one male laundryman \$10, and male laundryman employing one or more other persons \$25. The court held that there was no limitation in the Con-

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 177.

³⁰*Id.*

³¹*Id.* at 173.

³²*Hayes v. Smith*, *supra* note 21.

³³*Hilger v. Moore*, *supra* note 13 at 175.

³⁴*State v. Moody*, *supra* note 17 at 484.

³⁵*O'Connell v. State Board of Equalization*, 95 Mont. 91, 113, 25 P.2d 114 (1933) and *Mills v. State Board of Equalization*, 97 Mont. 13, 19, 33 P.2d 563 (1934).

³⁶*State v. French*, *supra* note 10 at 57.

³⁷*Id.*

stitution upon the legislature's power regarding trade or occupation licenses.

We are of the opinion that the first sentence of Section 1, Article XII, and the whole of Section 11, Article XII, are upon the same subject, must be read together, and that they refer to taxation, and the equality and uniformity thereof, and that the last sentence of Section 1, Article XII, upon licenses, does not fall within the uniformity provision.³⁸

The general subject of licenses was purposely left for the legislature.³⁹

In 1933 the equality and uniformity clause was used to support an attack made upon the income tax statute.⁴⁰ As has already been seen, if the income tax were determined to be an excise tax, i.e., a license, the clause would have no bearing. But if income were held to be property, the statute imposing graduated and progressive income tax would violate the uniformity requirement and, therefore, be invalid. The court struggled at great length but found it unnecessary to declare the exact nature of the income tax. It decided that income tax, whatever it is, is not a tax on property.⁴¹ Therefore, the uniformity requirement of Section 1 of Article XII does not apply to income taxes either.⁴²

The problem of whether income was property or not was recognized by the Legislature when it passed the income tax statute in 1933. The Legislature urged that an amendment known as the income tax amendment, presently Section 1a of Article XII, be ratified.

Article XII, Section 1a: The legislative assembly may levy and collect taxes upon incomes of persons, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the state government.⁴³

If Section 1a had been ratified before the tax statute was enacted, the question of whether or not income was property need not have been judicially determined since Section 1a provides for a graduated and progressive income tax. However, this section did create another question by its clause "for the purpose of replacing property taxes." The court held that the section did not impose an affirmative duty on the legislature to replace property taxes entirely.⁴⁴ "Had the people meant that the Legislature should replace property taxes completely on the advent of an income tax, they would have stated their injunction in the form of 'must' or 'shall' or 'no' as other constitutional proscriptions are worded."⁴⁵ The court further held, contrary to the defendants

³⁸*Id.* at 60.

³⁹Montana Milk Control Board v. Maier, 140 Mont. 38, 367 P.2d 305 (1962).

⁴⁰O'Connell v. State Board, *supra* note 35.

⁴¹*Id.* at 113, quoting from Brown, THE NATURE OF INCOME TAX, 17 MINN. L. REV. 127 (1933) at 145: "The fundamental nature of the income tax is in short that it is an income tax and nothing else."

⁴²O'Connell v. State Board, *supra* note 35 at 114. Affirmed: Mills v. State, *supra* Note State v. Toomey, 135 Mont. 35, 335 P.2d 1051 (1959).

⁴³MONT. CONST. art. XII, § 1A.

⁴⁴State v. Toomey, *supra* note 42 at 45.

⁴⁵*Id.*

contention in *State v. Toomey*, that simply because the people had confined the income tax to persons, firms, and corporations did not mean that the tax had to be imposed on them simultaneously.⁴⁶

THE CLASSIFICATION CLAUSE

Article XII, Section 11: Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.⁴⁷

The equality and uniformity provisions of the Montana Revenue and Taxation Article cannot be adequately explained or understood without analyzing Section 11 of the Article. As has already been seen, *Hilger v. Moore*⁴⁸ determined that Montana would not follow the uniform *ad valorem* system but would instead adopt the classification system. What does it mean to say that there must be a real difference between the subjects constituting the different classes? The judiciary has stated that classification of subjects for taxation "must be based upon substantial distinctions which makes one class readily different from another."⁴⁹ A classification which would make precisely the same kind of property assessable at one rate if owned by a farmer and at another and higher rate if owned by a corporation would be arbitrary. The court also said that "in order to group all taxable property in seven classes, the terms employed must be subject to broad and generous construction."⁵⁰

In 1920 an attack was made on a statute⁵¹ which required that all livestock brought into this state by any person for the purpose of being grazed for any length of time shall be taxed for the year in which they entered the state.⁵² On other property the annual assessment was usually made as of a certain date, such as March 1. If property did not come within the jurisdiction of the state prior to March 1 it was not taxable until the following year. The court held that the Legislature could not distinguish between a flock of sheep brought into the state after the first Monday in March for the purpose of grazing for any period and a flock of the same size and value brought into the state at the same time for the purpose of being fed in pens for the same length of time.⁵³ Such a classification was arbitrary and unjust.

The classification section has worked to restrict the power of the Legislature in providing assistance to large segments of the population. In 1933 a statute⁵⁴ was passed which would provide assistance to farm

⁴⁶*Id.*

⁴⁷MONT. CONST. art. XII, § 11.

⁴⁸*Hilger v. Moore*, *supra* note 13.

⁴⁹*Northern Pacific Railroad Co. v. Sanders Co.*, 66 Mont. 608, 615-16, 214 P. 596 (1923).

⁵⁰*Id.* at 613.

⁵¹REVISED CODES OF MONTANA § 2531 (1907) (Rep. Ch. 109, L. 1921).

⁵²*Hayes v. Smith*, *supra* note 21.

⁵³*Id.* at 314.

⁵⁴Chapter 41, Section 1, Laws of 1933.

and other land owners who had lost their lands due to delinquent taxes. The world-wide economic crisis precluded the owner from selling even a portion of the land in order to pay taxes on the balance. Since taxes continued at the same level, but land values dropped, the whole property was being taken to be sold. The Legislature proposed that the penalty for delinquent taxes be suspended as to the prior owners of the property. The effect of the proposal was to class all prior owners in a group and waive the penalty as to the group. The court held that the statute was in violation of Section 11 of Article XII of the Constitution.⁵⁵ "Discrimination between taxpayers upon whom taxes have been levied and assessed upon the same class of subjects cannot be permitted, for that necessarily implies inequality and injustice."⁵⁶ The court went on to say:

... Whether the policy of favoring some taxpayers of the same class over others is wise or unwise, the emergent conditions considered, is not for us to decide, nor was it a subject upon which the Legislature had a right to legislate, for the expression of the supreme will of the people—the Constitution—decides the policy for us all. It must be remembered that the provisions of the Constitution are mandatory and prohibitory unless otherwise expressed, and these provisions read the same whether in fair weather or in foul. The proposition that an emergency justifies a removal of constitutional safeguards is an egregious fallacy. A safeguard once let down inevitably must lead to mischief. If one be let down, why not another? 'And many an error, by the same example, will rush into the state.' . . .⁵⁷

The mere fact that property has been classified does not preclude its being further classified. The moneyed capital and shares of stock of a bank are taxable at a different and higher rate than are moneys and credits in the hands of an ordinary individual or corporation.⁵⁸ The moneyed capital of a bank is its stock in trade. The use to which property is devoted and its productivity are the measuring sticks for classification.⁵⁹ There is a substantial difference in the use and productivity of moneys in the hands of a bank and the moneys in the hands of an individual sufficient to sustain the foundation for such classification.⁶⁰

Another example of the Constitution permitting two identical articles of personal property to be taxed differently in the hands of different owners is evidenced by *Wheir v. Dye*.⁶¹ The motor vehicles in the hands of dealers were being taxed at a rate different from those in the hands of individuals and corporations. All vehicles were to be taxed as of noon January 1 whereas other personal property was being taxed as of March 1. The court held that since the whole class was to be taxed on the

⁵⁵State *ex rel* Fain v. Fischl, 94 Mont. 92, 98, 20 P.2d 1057 (1933).

⁵⁶*Id.*

⁵⁷*Id.* at 98 and 99.

⁵⁸Bank of Miles City v. Custer County, 93 Mont. 291, 297, 19 P.2d 885 (1933).

⁵⁹Hilger v. Moore, *supra* note 13.

⁶⁰Bank of Miles City, *supra* note 58 at 298.

⁶¹105 Mont. 347, 73 P.2d 209 (1937).

same day no discrimination in violation of Section 11 resulted.⁶² The court stated that the ease with which motor vehicles could be removed from the state was alone sufficient reason for special treatment, i.e., classification by the Legislature.⁶³ The fact that dealers and individuals stand in completely different relationship to the property involved was held to be a sufficient justification for the difference in tax rate.⁶⁴ The car in the hands of the dealer yields profit, while in the hands of an individual or corporation it is not normally expected to do so.⁶⁵

Another limiting effect Section 11 has rendered is illustrated by *Victor Chemical Works v. Silver Bow County*.⁶⁶ The statute⁶⁷ in question provided for the classification of all taxable property. Property in Class Four was to be assessed at 30% of its full and true value; property in Class Five (d) would be assessed at 7% of its full and true value.⁶⁸ Property in Class Four was described as "land, town and city lots, with improvement, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the constitution of Montana, and except as such property may be included in Class Five."⁶⁹ Property in Class Five (d) consisted of "Industrial property included in Class Four, for a period of three years after such property is first assessed. . . ."⁷⁰ The court declared that the Legislature had the power to "consider the use of industrial property and its productivity, and consistent with its appraisal of these factors may classify industrial property for taxation as such."⁷¹ However, the court found that this classification had no relation to the productivity or the use of the property reclassified so as to come within the rule first set forth in *Hilger v. Moore*.⁷² The amendment to the statute would set the industrial plant owned by Victor Chemical Works apart from other property of the same species and thereby discriminate "in favor of one as against another of the same class."⁷³ It would tax the plaintiff's property at 7% while others would be taxed at 30%.⁷⁴ "The plain mandate of our Constitution as we read sections 1 and 11, Article XII, is thwarted, if we give effect to any such attempted classification."⁷⁵

The significant question generated by the *Victor Chemical* decision was: does the Constitution, as interpreted in *Victor*, prohibit the legislature from granting tax exemption status at a reduced percentage of

⁶²*Id.* at 356.

⁶³*Wheir v. Dye*, *supra* note 61 at 355.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶130 Mont. 308, 301 P.2d 720 (1956).

⁶⁷Revised Codes of Montana § 84-301 (1947) (as amended chap. 178, Laws of 1951) [hereinafter R.C.M. 1947].

⁶⁸R.C.M. 1947 § 84-301.

⁶⁹R.C.M. 1947 § 84-301.

⁷⁰R.C.M. 1947 § 84-301.

⁷¹*Victor Chemical Works*, *supra* note 66 at 318.

⁷²*Id.* at 320.

⁷³*Id.* at 321.

⁷⁴*Id.*

⁷⁵*Id.*

assessment for a limited period of time to lure new industries into the state?⁷⁶ Justice Angstman concurring and dissenting in *Victor* stated that he did not think such to be the thrust of the Constitution at all.⁷⁷ The Legislature has since passed a statute which provides for separate classification of *new* industrial property.⁷⁸ One case has recognized this favorable classification for new industry but noted that the constitutionality of the statute was not being questioned.⁷⁹

In 1960 it was held that the uniformity requirement was not violated when the State Board of Equalization, in carrying out its duties of adjusting and equalizing taxation between oil pipe lines and other properties, recognized pipelines as a class by themselves.⁸⁰ Since that power is granted to the Board by the Constitution,⁸¹ a legislative enactment, i.e., the classification statute, may not limit that power.⁸² The class to which the plaintiff maintained it belonged was established by the Legislature as Class Four.⁸³ The Board had placed the oil pipe lines in Class Seven which was "all property not included in the six preceding classes."⁸⁴ The court held that so long as the properties of the two pipelines which are similar in nature and productivity are similarly treated, the constitutional mandate is observed.⁸⁵

The last case to be discussed in connection with the classification section involves reclassification of property. In *Mohland v. State Board of Equalization*,⁸⁶ the claim that reclassification of farm land as suburban was violative of Section 11 was not adequately formed. It can be seen from the case, however, that it is within the power of the Board to classify property in view of other factors. *Hilger v. Moore*⁸⁷ used very broad language in holding that classification of property was permissible. It is not only the economic use to which property is put, or its productivity, that decides its classification. It is also the property's "utility and its general setting in the economic organization of society."⁸⁸

⁷⁶HELLERSTEIN, STATE AND LOCAL TAXATION 51 (1969) "The line between proper classification under a constitutional provision permitting classification and unwarranted exemption is often difficult to draw. . . . Would such a decision [*Victor Chemical*] prevent the legislature from granting tax exemption of a reduced percentage of assessment for an initial 5 or 10 year period in order to lure new industries into the state?"

⁷⁷*Victor Chemical Works*, *supra* note 66 at 322.

⁷⁸R.C.M. 1947, § 84-301 (as amended chap. 239, Laws of 1961).

⁷⁹*Cherry Lane Farms v. Treasurer, Gallatin County*, 153 Mont. 240, 246, 456 P.2d 296 (1969).

⁸⁰*Yellowstone Pipe Line Co. v. State Board of Equalization*, 138 Mont. 603, 626-627, 358 P.2d 55 (1960).

⁸¹MONT CONST. art. XII, § 15.

⁸²*Yellowstone Pipe Line Co.*, *supra* note 80.

⁸³R.C.M. 1947, § 84-301.

⁸⁴*Id.*

⁸⁵*Yellowstone Pipe Line Co.*, *supra* note 80.

⁸⁶*Mohland v. State Board of Equalization*, 155 Mont. 49, 55, 466 P.2d 582 (1970).

⁸⁷*Hilger v. Moore*, *supra* note 13 at 173.

⁸⁸*Id.*

RECOMMENDATION

In its recommendations for revisions to the Constitution, the Taxation and Finance Subcommittee of the Montana Constitution Revision Commission (hereinafter Subcommittee) considered Section 9⁸⁹ of Article XII in conjunction with Sections 1 and 1a.⁹⁰ Simply stated, Section 9 of Article XII limits the rate of taxation on real and personal property. However, the section has no bearing on the rate of taxation of income.⁹¹ It is properly considered in conjunction with any changes in Section 1 since it is a limitation similar to limitations imposed by Section 11.

The Montana Legislative Council concluded in 1968 that Sections 1 and 1a were adequate but that Section 9 should be partially revised.⁹² However, the Subcommittee recommended that the three sections be deleted and proposed the following as Section 1:

The rates and methods of taxation of personal and corporate income and of real and personal property and license taxes upon persons and corporations for both state and local purposes shall be determined by law.⁹³

The Subcommittee then recommended that the present Section 11 be left in the Constitution as a reasonable limitation on the authority granted by Section 1.⁹⁴ But why limit the inherent power of the Legislature in such a manner? Is classification of property the best answer to property taxation now, and, if so, will it be the best answer in the future? What if it should be determined that the uniformity provision prohibits the favorable classification of industrial property to induce new industry to enter Montana? If the proposal of the Subcommittee is followed, the State will again be locked into a tax structure dictated by the Constitution. Should the people of the state be so afraid of the power of representative government that they will tie the hands of their representatives before sending them to the legislature? The *ad*

⁸⁹MONT CONST. art XII, § 9: The rate of taxation on real and personal property for state purposes, except as hereinafter provided, shall never exceed two and one-half mills on each dollar of valuation; and whenever the taxable property of the state shall amount to six hundred million dollars (\$600,000,000.00) the rates shall never exceed two mills on each dollar of valuation, unless the proposition to increase such rate, specifying the rate proposed and the time during which the rate shall be levied shall have been submitted to the people at the general election and shall have received a majority of all votes cast for and against it as such election; provided, that in addition to the levy for state purposes above provided for, a special levy in addition may be made on live stock for the purpose of paying bounties on wild animals and for stock inspection, protection and indemnity purposes, as may be prescribed by law, and such levy shall be made and levied annually in amount not exceeding four mills on the dollar by the state board of equalization, as may be provided by law.

⁹⁰Unpublished report of the Taxation and Finance Subcommittee of the Montana Constitution Revision Commission, November 20, 1969.

⁹¹State v. O'Connell, *supra* note 35.

⁹²Montana Legislative Council, *supra* note 2 at 57, 58 and 59.

The revision suggested for Section 9 was to delete reference to livestock levies and provide for any such levies by statute.

⁹³Taxation and Finance Subcommittee interim recommendations, *supra* note 90.

⁹⁴*Id.* at 9.

valorem system of taxation may at a later date again be considered to be a more equitable system of taxation.

The Model State Constitution⁹⁵ is silent as to the equality or uniformity of any tax that the legislature may impose. Four state constitutions were analyzed by this writer; two imposed uniformity restrictions on the legislature. Michigan's Constitution provides for the uniform *ad valorem* system, but then permits the Legislature to provide alternative means so long as every other tax is "uniform upon the class or classes upon which it operates."⁹⁶ In other words, the Michigan Constitution requires the Legislature to follow the uniform *ad valorem* rule or provide for the classification system. This same section provides for assessment and equalization objectives for all property assessments.⁹⁷ The Illinois Constitution requires the legislature to follow the uniform *ad valorem* system.⁹⁸ On the other hand, neither Alaska or Hawaii have any provision relating to the method by which the legislatures are to raise revenue.⁹⁹

It has been said that a state constitution should be silent on matters of finance and allow the legislature and governor complete freedom so that fiscal policies may be developed to meet current and emerging problems.¹⁰⁰ There should certainly be no limit on the rate of taxation that may be imposed. Neither should there be a provision telling the legislature what system of taxation must be used without at least allowing for alternatives. Since the legislature has inherent power to tax, any provision purporting to give the legislature that power is redundant. Sections 1, 1a, 9 and 11 may be deleted from the constitution and no section need to be proposed to replace them. The governor and legislature would then have the power, unhampered by constitutional

⁹⁵MODEL STATE CONSTITUTION, art. VII, Finance.

⁹⁶MICH. CONST. art. IX Finance and Taxation § 3: The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates.

⁹⁷MICH. CONST. art. IX, § 7.

⁹⁸ILL. CONST. art. IX, Revenue, §1: The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property — such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise: but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocerykeepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates.

⁹⁹ALASKA CONST. art. IX, Finance and Taxation; HAWAII CONST. art. VI, Finance and Taxation.

¹⁰⁰LEAGUE OF WOMEN VOTERS OF MONTANA, A STUDY OF THE MONTANA CONSTITUTION, Study Unit Two (January 1970) citing: MODEL STATE CONSTITUTION, (6th ed., rev, 1968), 91.

dictates, to provide the state with a fiscal policy commensurate with the needs and desires of the people. A provision that would prohibit the taxing power from being surrendered or contracted away would be a valid constitutional dictate.

EXEMPTIONS

There are three sections in the Montana Constitution Article XII which deal specifically with exemption from taxation. Section 2 both requires and permits certain legislative action; Sections 6 and 7 are prohibitory in nature. Section 2 on public and quasi-public property exemptions has been extensively litigated and as a consequence it has been judicially determined what property will and what property will not be exempted. Those sections that prohibit the legislature from exempting property within a given locality and from exempting any corporate property have had some court interpretation but are relatively clear as to what legislative action is proscribed.

PUBLIC PROPERTY EXEMPTIONS

Section 2: The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt from taxation; and such other property as may be used exclusively for the agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of purely public charity and evidences of debt secured by mortgages of record upon real or personal property in the state of Montana, may be exempt from taxation.¹⁰¹

This exemption section provides that all public property *will* be exempt from taxation but that quasi-public property *may* be exempted from taxation.¹⁰² The legislature may exempt quasi-public property, but it may not exempt any other kind of property.¹⁰³ If the Legislature wants to provide for taxation of real estate to raise funds, it cannot tax real estate only and allow other classes of property to be exempted.¹⁰⁴ Reading the constitution as a whole results in the conclusion that all property is to be taxed, if indeed any is taxed, unless it falls within the category provided by Section 2.

Two questions are presented and must be answered in the affirmative before property may obtain exempt status. First, is it a tax that is being imposed; and second, does the property fit into the categories provided by the Constitution. The first question no longer presents great difficulties. All license taxes, real property taxes and personal property taxes are taxes within the meaning of Section 2. Special assessments have been held to be taxes and, therefore, not assessable against property falling into Section 2.¹⁰⁵ However, assessments against public property

¹⁰¹MONT. CONST. art. XII, § 2.

¹⁰²*Cruse v. Fischl*, 55 Mont. 258, 262, 175 P. 878 (1918).

¹⁰³*Id.* at 263.

¹⁰⁴*Stoner v. Timmons*, 59 Mont. 158, 196 P. 519 (1920).

¹⁰⁵*Ford v. Great Falls*, 46 Mont. 292, 308, 127 P. 1004 (1912).

within an irrigation district can be made regardless of the provision since no part of the revenue derived from the assessment goes to fill the state coffers or is used for government purposes.¹⁰⁶

The second question is more difficult to resolve and has been reviewed by the Court on many occasions. Thus, in 1938 such a review was made of a statute which provided that all property in the possession of legal guardians of incompetent veterans of World War I, or minor children of such veterans if such property is funds or derived from funds received from the United States, shall be exempt from all taxation as property of the United States while held by the guardian.¹⁰⁷ The City of Missoula taxed the property of a minor child who met the statute's qualifications. The argument was made that the statute violated the Montana Constitution since it exempted property other than public or quasi-public property. The Montana Court held that the statute was a valid exercise of the legislative power, and that since title did not pass from the United States, the property could not be taxed.¹⁰⁸

Another case in which it was determined that the United States held title to property was *Calvin v. Custer County*.¹⁰⁹ The United States and Carl Calvin entered into a contract in which the United States was to purchase land. The agreement was made firm on June 17, 1938 and the United States entered into possession and made extensive improvements prior to March 1, 1939. Irregularities in the chain of title were to be cleared up by Mr. Calvin. The formal deed was delivered to the United States on November 15, 1939. In an action to recover taxes assessed as of March 1, 1939, and paid under protest, the court held that it is the holder of the equitable title and not the legal title which determines the exemption under our Constitution.¹¹⁰ Since the United States held equitable title on March 1, 1939, the property was considered to be public property and protected by the Constitution.

In *Northwestern Improvement Co. v. Rosebud County*,¹¹¹ it was determined that a building owned by the company, leased to the school district and used for school purposes was exempt from taxation under Section 2. The Court stated that since the improvement company was not obtaining any economic advantage from the lease the property should be tax exempt.¹¹² The use to which the owner of the building was applying it could not be taken as the determinative factor, even though he was obtaining rent. The purpose for the exemption said the court was to encourage and promote the cause of education.¹¹³ Since the school was enjoying a benefit, and the property was actually being

¹⁰⁶*Buffalo Rapids In. Dist. v. Collieran*, 85 Mont. 466, 478-79, 279 P. 369 (1929).

¹⁰⁷R.C.M. 1935, § 1998 (now R.C.M. 1947, § 84-202).

¹⁰⁸*Henderson v. City of Missoula*, 106 Mont. 596, 79 P.2d 547 (1938).

¹⁰⁹111 Mont. 162, 167, 107 P.2d 134 (1940).

¹¹⁰*Id.*

¹¹¹129 Mont. 412, 417, 288 P.2d 657 (1955).

¹¹²*Id.* The property owner was charging rent at a rate that was less than break even.

¹¹³*Id.* at 416.

used for educational purposes, the tax exemption should be enjoyed by the owner.

In 1960 a case came before the Montana Court in which the defendant argued that his society was within the religious organization exemption of Section 2.¹¹⁴ In the alternative he argued that the society was an agricultural or horticultural organization also within the boundaries of the tax exemption section. The state was seeking to collect the corporation license taxes for the fourteen years in which the King Colony had been incorporated. The Articles of Incorporation indicated that the colony was an International Church Society devoting its entire membership to farming, stock growing and other branches of horticulture.¹¹⁵ The court held that "a nondiscriminating license tax on these activities does not interfere with the religious freedom or the free exercise of religion."¹¹⁶ As to the allegation that the society was an agricultural or horticultural organization the court quoted from Mertens Law of Federal Income Taxation:

Labor, Agricultural or Horticultural Organizations. The exemption of labor, agricultural and horticultural organizations is by its terms unconditional, but interpretation has considerably qualified and restricted the exemption. While the statute contains no express requirement prohibiting the inurement of the earnings of such organization to the benefit of private shareholders or individuals, the Regulations have provided that requirement and the Regulations have not been challenged in the courts. The principle (sic) qualification for exemption under the Regulations are the following: (1) the organization must have no net income inuring to the benefit of any member, (2) it must be educational or instructive in character, and (3) it must have as its object the betterment of the conditions of those engaged in labor, agricultural or horticultural pursuits, the improvements of products and the development of a higher degree of efficiency in the respective occupations. The fact that Congress has repeatedly re-enacted the same statutory language with knowledge of the well-established administrative interpretation, lends foundation to an assertion of legislative acquiescence.¹¹⁷

The court also held that the State Board was warranted in relying on the Federal interpretation of the language since the Legislature adopted it from the Federal act.¹¹⁸ The society was not permitted a tax exemption since the agricultural pursuits were purely commercial simply being "the means of acquiring a livelihood for the members of the Colony and of accumulating money for expansion purposes."¹¹⁹

¹¹⁴State v. King Colony Ranch, 137 Mont. 145, 350 P.2d 841 (1960).

¹¹⁵*Id.* at 147.

¹¹⁶*Id.* at 150.

¹¹⁷*Id.* at 151, quoting MERTON'S LAW OF FEDERAL TAXATION § 34.19.

¹¹⁸*Id.*

¹¹⁹*Id.* at 149.

In *Flathead Lake Methodist Camp v. Webb*¹²⁰ the plaintiff was a non-profit corporation, incorporated for the purpose of establishing and maintaining a Methodist Church Camp on Flathead Lake. Since the camp was a considerable distance from both Polson and Kalispell there was need for extensive development. Some of the 22 acres of property was conceded to be exempt because it was used for religious purposes, but the question was raised whether the buildings and acreage other than that specifically used for religion could be exempted.¹²¹ The court stated that the test to determine exemption status included educational and charitable grounds as well as religious grounds.¹²² The education standard is not restricted by traditional concepts: "The end of the education may be to develop either the mental, physical or moral qualities."¹²³ If the training is religious education, it is to be measured as educational and not as religious.¹²⁴ The court indicated that the camp might also have qualified under the public charity concept had it been necessary to decide the case on that basis.¹²⁵ The county treasurer had argued at great length that exemption statutes were to be strictly construed and that taxation was the general rule. However, since there was substantial evidence to support the contention that all 22 acres and 28 improvements were necessary for the accomplishment of the educational purposes, the court affirmed the finding that the entire area should be tax exempt.¹²⁶ The dissent felt that too much of the shore line, then valued at about \$75 per foot, would take on a tax exempt status, since the rule laid down by the majority could be complied with by virtually every church on the Flathead.¹²⁷

What constitutes a charitable organization is illustrated by *Bozeman Deaconess Foundation v. Gallatin County*.¹²⁸ The foundation was a non-profit corporation without capital stock. At issue was whether Hillcrest Homes, an elderly and infirm persons' home which required occupancy fees ranging from \$7000 to \$32,000 and monthly maintenance charges of \$150 to \$250 per month, could qualify as a tax exempt charitable institution. The court stated that there need not be an exclusive relation

¹²⁰144 Mont. 565, 567, 399 P.2d 90 (1965). The following is the statement of facts from which it was determined that the basic use was educational: "The camp caters principally to children on an organized, two-week basis. They are segregated by age throughout the summer, each two-week camp having approximately 150 children in attendance. The area served is somewhat larger than a circle encompassing western Montana. The activities range from instruction, praying, meditation, and nature walks to secular recreation such as archery, swimming, and crafts. Each day is organized to provide a balanced program of arts and crafts, physical activity, religious instruction, rest, chores and prayers. The majority of the children are Methodists, but there is evidence that many different faiths have been represented there over the years."

¹²¹*Id.* at 569.

¹²²*Id.*

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.* at 570.

¹²⁶*Id.* at 574.

¹²⁷*Id.* at 575.

¹²⁸151 Mont. 143, 439 P.2d 915 (1968).

to poverty stricken people in order to qualify as a charitable corporation.¹²⁹ Charging fees did not destroy the status either, so long as they were channelled into the operation of the home, and not to the pockets of the founders.¹³⁰ The property and facilities of Hillcrest were found to be devoted exclusively to the care of the sick and aged.¹³¹ In its conclusion the court threw open the door to further judicial determinations by stating: "The scope of charity and the standards under which it is administered are not frozen by the past, but keep pace with the times and the new conditions and wants of society."¹³²

One may well ask of what value is a measure in a Constitution that *permits* the legislature to exempt certain categories of property when it is within the inherent power of the legislature to do so. One may also ask why the Constitution exempts property belonging to the United States since that property is exempt from taxation unless permission to tax the same has been given by the federal government. We may then begin with the proposition that a section permitting the legislature to exempt property or prohibiting the taxation of United States property would be empty as well as redundant.

The Model State Constitution has no provision concerning exemption from taxation.¹³³ By failing to provide for exemptions, the authors of the Model have exhibited their faith in the democratic system of government. The state of Hawaii has also shown its faith in the ability of the people to govern themselves by keeping their Constitution silent as to what the legislature can do in the area of property tax exemptions.¹³⁴

The other three constitutions analyzed by this writer each had a section dealing with property exemptions. The Michigan Constitution exempts only property owned and occupied by non-profit religious and educational organizations which is used exclusively for those purposes.¹³⁵ The Illinois provision permits the legislature to provide for tax exemption of all property that the Montana Constitution presently either requires or allows to be exempted.¹³⁶ The Alaska Constitution requires that all state and local government property be exempted as well as all

¹²⁹*Id.* at 148.

¹³⁰*Id.*

¹³¹*Id.* at 149.

¹³²*Id.*

¹³³MODEL STATE CONSTITUTION art. VIII.

¹³⁴HAWAII CONST. art. VI.

¹³⁵MICH. CONST. art. IX, § 4. Property owned and occupied by non-profit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes.

¹³⁶ILL. CONST. art. IX, § 3. The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.

religious, charitable, cemetery and educational purpose property.¹³⁷ None of these provisions should be adopted *in toto* in Montana.

The Montana Legislative Council declared that this section of the Constitution was adequate.¹³⁸ However, the Subcommittee concluded that this section was statutory in nature and should be replaced with a provision similar to the one in the New Jersey Constitution.¹³⁹ That section provides:

Exemptions from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.¹⁴⁰

There are a number of reasons why this section is a desirable one. First, it requires that any exemption law must be a general law. Second, it distinctly provides for a status quo until the legislature takes action to change the exemption status of any property. Third, it provides for the legislature to define the terms religious, educational, charitable, and cemetery purposes. Fourth, the section restricts the legislature only in areas that have, historically, been exempt. Furthermore, it is a socially sound policy to exempt property of this nature. This writer agrees with the Subcommittee that the New Jersey provision would be a sound section for an article on taxation and finance.

LOCAL PROPERTY EXEMPTIONS

Section 6: No county, city, town or other municipal corporation, the inhabitants thereof nor the property therein, shall be released or discharged from their or its proportionate share of state taxes.¹⁴¹

According to the Subcommittee, this section was included in the 1889 Constitution to deal with a specific situation which existed in that era.¹⁴² There may be good reason to exempt certain individuals or property in a given locality. It would be difficult, however, if not impossible, for the legislature to do so. But the section should be deleted as it works to limit legislative power and discretion.

¹³⁷ALASKA CONST. art. IX, § 4. The real and personal property of the State or its political subdivisions shall be exempt from taxation under conditions and exemptions which may be provided by law. All, or any portion of, property used exclusively for non-profit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained until otherwise provided by law.

¹³⁸Legislative Council, *supra* note 2 at 58.

¹³⁹Subcommittee, *supra* note 90 at 6.

¹⁴⁰N.J. CONST. art. VIII, § 1 (2).

¹⁴¹MONT. CONST. art. XII, § 1 (2).

¹⁴²Subcommittee, *supra* note 90 at 7.

CORPORATE PROPERTY EXEMPTIONS

Section 7: The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation.¹⁴³

This section is similar to the previous section except that it prohibits the legislature from suspending any corporate property from taxation. Just as there may be valid reason for the legislature to suspend taxation of local property, there may also be reason to suspend the taxation of a corporation's property. The section has been held to prohibit the exemption from taxation of certain air and water pollution control equipment.¹⁴⁴ It can be argued that it would have been desirable for taxes to have been suspended for a period of time as an incentive to the company to make such an investment. The section probably does not prohibit the legislature from giving industrial property a favorable *classification* as an incentive to locate in this state. As was seen in the *Victor Chemical* case, however, the legislature must be careful not to exempt industrial property.¹⁴⁵ In essence, this section, when considered with Sections 1, 2 and 11 requires the legislature to step carefully in the area of property classification. But so long as truly favorable classification of new industrial property is permitted, it simply is not prohibiting that which it purports to prohibit. Therefore, it, too, should be omitted from any proposal for a new taxation article, thereby giving the legislature complete discretion in this area.

THE REMAINING PROVISIONS

The remaining provisions of Article XII will be discussed in the order in which they appear in the Constitution. Time and space limitations dictate that only certain of the provisions be set forth and discussed in detail. The remaining provisions are not as difficult to understand as the ones discussed above, and several have drawn almost unanimous recommendations for deletion.

¹⁴³MONT. CONST. art. XII, § 7.

¹⁴⁴Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970). Missoula County issued revenue bonds to raise money to aid Hoerner Waldorf Corporation, a paper producer, in reducing air and water pollution. Because of section 7 the corporation could not have been given a tax incentive. The argument was then made that since it was county funds that purchased the equipment, the county owned the equipment and it could not, therefore, be subject to tax because of the prohibitions of section 2. But since the court looked to the use rather than the title of the property, and since Hoerner Waldorf was using the property, it was held subject to taxation.

¹⁴⁵Victor Chemical, *supra* note 66.

Section 1b.¹⁴⁶ This section is the only earmarking-of-funds section in the Montana Constitution and was passed in 1956. The measure induces inefficiency by requiring the appropriation of large sums of money without regard to the needs of the state as a whole, or the needs of the highways in particular. The Legislative Council has recommended that the section be deleted,¹⁴⁷ but the Taxation and Finance Subcommittee thought that it should remain in the new Constitution.¹⁴⁸ If the people of this state wish to insure that the highways are properly funded, a legislative enactment similar to this Constitutional provision would suffice. But this provision should not appear in the Constitution as fundamental law.

Section 3.¹⁴⁹ This section smacks of special interest flavor, understandable only when one considers the time the Constitution was written and the type of economic activity that was then predominate in the state. An extensive analysis of this section appears in a recent edition of the Montana Law Review.¹⁵⁰ The author of that comment believed the most damning feature of Section 3 was that it is in the Constitution at all.¹⁵¹

The measure has a wise legislative purpose, its draftsmanship is passable; but even if it were perfect, that would be no reason to immortalize it in the stone of constitutional mandate. . . . Under Section 3, as adopted, the legislature has been powerless to clarify its verbose and litigation-breeding language; powerless to adapt the purpose of that section to changing developments; and powerless to modify and correct an ill advised court decision.¹⁵²

The Montana Legislative Council¹⁵³ and the Subcommittee¹⁵⁴ have both

¹⁴⁶MONT. CONST. art. XII, § 1b: No monies paid into the state treasury which are derived from fees, excises or license taxes relating to registration, operation or use of vehicles on the public highways or to fuels used for the propulsion of such vehicles, except fees and charges paid to the board of railroad commissioners of the state of Montana or its successor or successors by motor carriers pursuant to law, shall be expended for other than cost of administering laws under which such monies are derived, statutory refunds and adjustments provided therein, payment of highway obligations, cost of construction, reconstruction, maintenance and repair of public highways, roads, streets, and bridges, and expenses authorized by the state legislature for dissemination of public information relating to the public highways, roads, streets and bridges of the state of Montana and the use thereof.

¹⁴⁷Montana Legislative Council, *supra* note 2 at 58.

¹⁴⁸Subcommittee, *supra* note 90 at 4.

¹⁴⁹MONT. CONST. art. XII, § 3: All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.

¹⁵⁰Comment, *Taxation of Mineral Interests Under Article XII, Section 3 of the Montana State Constitution*, 32 MONT. L. REV. 47 (1971).

¹⁵¹*Id.* at 63.

¹⁵²*Id.* at 63-64.

¹⁵³Montana Legislative Council, *supra* note 2 at 58.

¹⁵⁴Subcommittee, *supra* note 90 at 11.

recommended that the section be deleted. This is not to say that the effect is undesirable but only that it is statutory in nature and should, if desired, be passed as a statute.

Section 4.¹⁵⁵ This section restricts the power of the Legislature to provide assistance to the counties and municipalities of the state. The only money that the state is permitted to distribute to the local government is raised by license taxes,¹⁵⁶ although the state did try to assist some cities in providing parks in 1910.¹⁵⁷ A board of park commissioners was to be established in these cities and the members were to be appointed by the governor. The board was then to advise the city council of the amount needed to carry out its function. The court held that if the state could not raise taxes to give to the cities and towns, neither could they establish a park board in cities with authority to tell the city council to raise money to support that board's functions.¹⁵⁸ The court found that this statute violated not only Article XII, Section 4, but also the entire theory of local self-government established by the Constitution.¹⁵⁹ It is provisions in a Constitution similar in nature to Section 4 that have tied the hands of state government in other states thereby restricting the aid they can give to the cities.¹⁶⁰ The Montana Legislative Council determined that this section is adequate,¹⁶¹ while the Subcommittee reserved judgment at the time it made its report.¹⁶² Whatever the convention decides in this area, it must be consistent with the theory of local government adopted. It is not inconsistent to retain the theory of local self-government and still allow the legislature some authority to provide assistance to local governments. If the constitution is silent, the legislature will have that authority.

Section 5.¹⁶³ This section purports to insure that the same property valuation will be used whether it is a state or local tax that is being

¹⁵⁵MONT. CONST. art. XII, § 4: The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town, or municipal purposes, but it may by law invest in the corporate authorities thereof powers to assess and collect taxes for such purposes.

¹⁵⁶Subcommittee, *supra* note 90 at 6.

¹⁵⁷Laws of 1901, 73 (R.C.M. 1907 § 3318-3324).

¹⁵⁸State v. Edwards, 42 Mont. 135, 149, 111 P. 734 (1910).

¹⁵⁹*Id.* at 149-150.

¹⁶⁰Subcommittee, *supra* note 90 at 6. Quoting from, LEAGUE OF WOMEN VOTERS OF MONTANA, STATE AND LOCAL RELATIONS, STATE AND LOCAL FINANCE (October, 1964) at 5: "Montana falls near the bottom of the list in the proportion of local revenue derived from state sources — 16.3 percent in 1962. Only six states show a smaller proportion: Alaska (13.6 percent), Hawaii (11.3), Maine (13.7), New Hampshire (7.0), South Dakota (9.7), and Vermont (12.1). With 90.2 percent of the Montana total going to education it is obvious that the state is contributing too little to county and municipal support. The percentage of local government revenues raised from state grants-in-aid and shared taxes has remained relatively constant (15.8 to 16.3) in the two decades from 1942 to 1962, although the large increases in local budgets has forced substantial increases in the hard-pressed property tax in the same period."

¹⁶¹Montana Legislative Council, *supra* note 2 at 58.

¹⁶²Subcommittee, *supra* note 90 at 7.

¹⁶³MONT. CONST. art. XII, § 5: Taxes for city, town and school purposes may be levied on all subjects and objects of taxation, but the assessed valuation of any property shall not exceed the valuation of the same property for state and county purposes.

levied. As a practical matter, it would be cumbersome and expensive to value property at two different rates. It would not be difficult to arrive at the same result by carefully drafting the article requiring equality and uniformity of all property taxes if it is decided that such an article is desirable. This is probably the effect of the article suggested by the subcommittee.¹⁶⁴ In any event, a separate section devoted to this proposition is not necessary.

Section 8.¹⁶⁵ This section prohibits the taking of private property for the debts of public corporations. The judiciary has only once been asked to construe this section. In *Edwards v. County of Lewis and Clark*,¹⁶⁶ the issue was whether the county could sell coupon bonds of the county equal to the amount of a \$32,077.82 debt owed for road work, without submitting the question to the electors. However, the statute in question prohibited the refunding of outstanding indebtedness exceeding \$10,000 without the approval of the voters of the county.¹⁶⁷ Since the legislature had acted, the county could validly incur debts up to \$10,000, but not more. The county commissioners could not exercise greater power than was given them by statute. The court stated that the only meaning of the section was that no statute may be enacted

. . . under which private property may be taken to pay the debts of a public corporation, such as a county or city. Aside from this limitation the legislature was left free to enact such measures as it deemed best touching the subject matter under consideration. If it failed to act at all there is no power other than public opinion which can coerce it into activity.¹⁶⁸

The Legislative Council concluded that this section is adequate.¹⁶⁹ The Subcommittee has made recommendations that would broaden the tax base and allow taxes on personal and business income.¹⁷⁰ The Fourteenth Amendment prohibits the taking of property without due process. Furthermore, sound budget measures would prohibit this method of remedial financing. By removing the restrictions on state aid to local government, such a situation would not likely arise. In any case, guidelines and restrictions placed upon the revenue-raising power of cities and towns are properly the subject of legislative enactments.

¹⁶⁴Subcommittee, *supra* note 90 at 7. This provision is quoted in textual matter at footnote 93.

¹⁶⁵MONT. CONST. art. XII, § 8: Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority.

¹⁶⁶53 Mont 359, 165 P. 297 (1917).

¹⁶⁷*Id.* at 368.

¹⁶⁸*Id.* at 365.

¹⁶⁹Legislative Council, *supra* note 2 at 59.

¹⁷⁰Subcommittee, *supra* note 90 at 8. Proposed Section 8: "Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by taxation of personal and business income and/or by assessment taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority."

Section 10.¹⁷¹ This section requires that the funds derived from tax levies shall be paid into the state treasury and may not be paid out of the treasury except as provided by law. All four state constitutions analyzed by this writer have similar sections and so does the Model State Constitution.¹⁷² The Legislative Council in its study of several constitutions found no state without a similar safeguard written into the constitution.¹⁷³ The Subcommittee discovered that this provision is duplicated in Article V, Section 34.¹⁷⁴ However, since other subcommittees had recommended that that section be deleted and that the limitation more properly belongs in the Taxation and Revenue Article, the Subcommittee recommended that Section 10 be retained.¹⁷⁵ This writer agrees that a provision at least similar to Section 10 is both appropriate and desirable.

Section 11.¹⁷⁶ Most state constitutions provide that taxes may only be levied for public purposes. Both the Legislative Council¹⁷⁷ and the Subcommittee¹⁷⁸ have indicated that in their judgment the section is adequate and a reasonable limitation on the legislature's power. The judiciary has interpreted this section quite liberally and allowed the discretion of the legislature to have great weight in determining what is a public purpose.

Whether a particular purpose is 'public,' as that term is employed [above], is not always easy of solution. The power of taxation is a legislative prerogative, and therefore, the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissible is for the legislature in the first instance.¹⁷⁹

¹⁷¹MONT. CONST. art. XII, § 10: All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law.

¹⁷²MODEL STATE CONSTITUTION § 7.03. (a) No money shall be withdrawn from the treasury except in accordance with appropriations made by law, nor shall any obligation for the payment of money be incurred except as authorized by law. The appropriation for each department, office or agency of the state, for which appropriation is made, shall be for a specific sum of money and no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof, except when required by the federal government for participation in federal programs.

(b) All state and local expenditures, including salaries paid by the legislative, executive and judicial branches of government, shall be matters of public record.

¹⁷³Legislative Council, *supra* note 2 at 59.

¹⁷⁴Subcommittee, *supra* note 90 at 8.

¹⁷⁵*Id.*

¹⁷⁶MONT. CONST. art. XII, § 11: Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

Discussion of the second sentence of this section was presented in conjunction with section 1, Equality and Uniformity. The first sentence of the section is being presented in its numerical order. Concurrence with the Legislative Council and the Subcommittee concerning section 11 goes only to the first sentence of that section as it is presently written.

¹⁷⁷Legislative Council, *supra* note 2 at 59.

¹⁷⁸Subcommittee, *supra* note 90 at 9.

¹⁷⁹Lewis and Clark County v. Industrial Accident Board of Montana, 52 Mont. 6, 12, 155 P. 268 (1916).

In *Lewis and Clark County*¹⁸⁰ the issue was whether Workman's Compensation was a public purpose. The court, of course, held that it was. "The mere fact that money raised will go to individuals will not condemn the Act in question, since the test is not as to who receives the money, but, is the purpose for which it is to be expended a public purpose."¹⁸¹ This writer concurs with the conclusion of the Legislative Council and the Subcommittee that this is a reasonable limitation on the legislature's power, even though the reviewing authority will place great weight on the legislature's interpretation of public purpose.

Section 12.¹⁸² The Subcommittee has succinctly stated the purpose of this section: "This section prohibits deficit spending during any fiscal year, except for certain defense expenditures."¹⁸³ However, this section has been held not to bar the raising of revenue for payment of outstanding and unpaid warrants which resulted from a failure in prior years of revenue to equal appropriations.¹⁸⁴ An appropriation is not a setting apart of general funds for a specific purpose. It is only "the sanction of law to the expenditure of a definite amount of [such] funds in the treasury, or which is contemplated will be collected under existing revenue laws."¹⁸⁵ The problem arose during the depression years and the state was not collecting what it had anticipated it could and should collect. By paying off the outstanding warrants from prior years and continuing to operate the state government resulted in an empty treasury for some of the current expenses. The court stated:

We therefore hold that § 12, Art. XII, has to do only with the relation of future expenditures to income so far, at least, as the appropriations are made under constitutional mandates and that the appropriations are made under constitutional mandates and that the appropriations made and expenditures authorized, and which resulted in the registered warrants attacked, did not exceed the total tax then provided by law and applicable thereto, within the meaning of that section.¹⁸⁶

Whether deficit spending is or is not a sound economic theory should not be decided by convention delegates. Theories of government finance should not be locked into the state's basic legal document. It is not inconceivable that circumstances beyond the control of the state officers

¹⁸⁰*Id.*

¹⁸¹*Stanley v. Jeffries*, 86 Mont. 114, 129, 284 P. 134, 70 A.L.R. 166 (1930).

¹⁸²MONT. CONST. art. XII, § 12: No appropriation shall be made nor any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided by law, and applicable to such appropriation or expenditure, unless the legislative assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in Section nine (9) of this article, to pay such appropriations or expenditures within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war. No appropriation of public moneys shall be made for a longer term than two years.

¹⁸³Subcommittee, *supra* note 90 at 9.

¹⁸⁴*State ex rel Tipton v. Erickson*, 93 Mont. 466, 19 P.2d 227 (1933).

¹⁸⁵*Id.* at 473.

¹⁸⁶*Id.* at 474-75.

could create a situation in which deficit spending would be necessary and desirable. Indeed, this is illustrated by *State v. Erickson*.¹⁸⁷

The Legislative Council has recommended that this section be retained.¹⁸⁸ The Subcommittee revised the section deleting any reference to Section 9 which the Subcommittee has suggested repealing.¹⁸⁹ Contrary to those recommendations, this writer believes that it should be within the discretion of the legislature to determine whether or not deficit spending is a proper economic alternative under a given set of circumstances.

Section 13.¹⁹⁰ This section sets forth the details concerning administrative matters dealing with the duties of the state treasurer and the responsibilities of the governor. No other constitution analyzed has similar measures. Both the Legislative Council¹⁹¹ and the Subcommittee¹⁹² concluded that this section was statutory in nature and recommended that it be deleted. This writer agrees with that recommendation.

Section 14.¹⁹³ This section of the article establishes a state depository board made up of the governor, state auditor and state treasurer. It is statutory in nature. The Legislative Council recommended deletion,¹⁹⁴ but the Subcommittee failed to comment upon it in its report. It should, indeed, be deleted, thereby allowing the Legislature to provide for a depository or board as it sees fit.

¹⁸⁷*State v. Erickson*, *supra* note 184.

¹⁸⁸Legislative Council, *supra* note 2 at 60.

¹⁸⁹Subcommittee, *supra* note 90 at 9.

¹⁹⁰MONT. CONST. art. XII, § 13: The state treasurer shall keep a separate account of each fund in his hands, and shall at the end of each quarter of the fiscal year report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place or places where the same is kept or deposited, and the number and amount of every warrant paid or redeemed by him during the quarter. The governor, or other person or persons authorized by law, shall verify said report and cause the same to be immediately published in at least one newspaper printed at the seat of government, and otherwise as the legislative assembly may require. The legislative assembly may provide by law further regulations for the safe keeping and management of the public funds in the hands of the treasurer; but notwithstanding any such regulations, the treasurer and his sureties shall in all cases be held responsible therefor.

¹⁹¹Legislative Council, *supra* note 2 at 60.

¹⁹²Subcommittee, *supra* note 90 at 11.

¹⁹³MONT. CONST. art. XII, § 14: The governor, state auditor and state treasurer are hereby constituted a state depository board with full power and authority to designate depositories with which all funds in the hands of the state treasurer shall be deposited, and at such rate of interest as may be prescribed by law. When money shall have been deposited under direction of said depository board and in accordance with the law, the treasurer shall not be liable for loss on account of any such deposit occurring through damage by the elements or for any other cause or reason occasioned through means other than his own neglect, fraud or dishonorable conduct. The making of profit out of public moneys, or using the same for any purpose not authorized by law, by the state treasurer or by any other public officer, shall be deemed a felony, and shall be punished as provided for by laws and part of such punishment shall be disqualification to hold any public office.

¹⁹⁴Legislative Council, *supra* note 2 at 60.

Section 15.¹⁹⁵ This section establishes and governs the actions of the State Board of Equalization. Numerous cases have been decided by the Montana Court defining the powers and duties of the Board. The Legislative Council has recommended its deletion.¹⁹⁶ The comments of the Subcommittee are of particular interest.

This section is statutory; it has been amended twice, with many more amendments proposed. . . . All [of these] studies have indicated administrative weakness in the present constitutional method of administrative organizations for property taxation.

The deletion of this section from Article XII would allow the legislature to establish by law an improved method of property tax administration. Presently, this would require a constitutional amendment. The State Board of Equalization, in testimony before the Legislative Council in 1964 agreed there was merit in removing the constitutional status of the board.¹⁹⁷

The Subcommittee concurred with the Legislative Council's recommendation.¹⁹⁸ No other constitution analyzed by this writer has a provision even remotely similar to this section. The legislature should have much needed flexibility in this area if a sound fiscal policy is to be established.

¹⁹⁵MONT. CONST. art. XII, § 15: The board of county commissioners of each county shall constitute the county board of equalization. The duties of such board shall be to adjust and equalize the valuation of taxable property within their respective counties, and all such adjustments and equalizations may be supervised, reviewed, changed, increased or decreased by the state board of equalization. The state board of equalization shall be composed of three members who shall be appointed by the governor by and with the advice and consent of the senate. A majority of the members of the state board of equalization shall constitute a quorum. The term of office of one of the members first appointed shall end on March 1st, 1925, of another first appointed on March 1st, 1927, and of the third first appointed on March 1st, 1929. Each succeeding member shall hold his office for the term of six years, and until his successors shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy shall hold office for the unexpired term in which the vacancy occurs. The qualifications and salaries of the members of the state board of equalization shall be as provided by law, provided, however, that such members shall be so selected that the board will not be composed of more than two persons who are affiliated with the same political party or organization; provided, further, that each member shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, or engage in any occupation or business interfering or inconsistent with his duties as a member of such board, or serve on or under any committee of any political party or organization, or take part, either directly or indirectly, in any political campaign in the interest of any political party or organization or candidate for office. The state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase, or decrease valuations made by county assessors or equalized by the county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties between the different classes of property, and between individual taxpayers. Said state board of equalization shall also have such other powers, and perform such other duties relating to taxation as may be prescribed by law.

¹⁹⁶Legislative Council, *supra* note 2 at 61.

¹⁹⁷Subcommittee, *supra* note 90 at 13.

¹⁹⁸*Id.* at 14.

Section 16.¹⁹⁹ This section requires that there be statutes to prescribe the manner in which assessment is to be accomplished. If the provision said no more, there would be no compelling reason to change it. However, since it requires that certain taxes must be apportioned to local government, it impedes legislative discretion. Furthermore, it is complicated and expensive to administer a law which dictates apportionment in such a manner.

Three of the four state constitutions analyzed by this writer require that the legislature provide for assessment standards. Whether the standard should be true cash value or a percentage thereof is not pertinent to the convention. The legislature should be permitted to decide the standard. "The method of tax determination, assessment, and collection should be, wherever possible, left to legislative enactment, since improved practices and techniques should be available."²⁰⁰ Although the Legislative Council²⁰¹ proposed that the section be amended to delete reference to the State Board, the Subcommittee recommended that the provision be amended to read "all property shall be assessed in the manner prescribed by law."²⁰² This writer concurs with the Subcommittee's recommendation.

Section 17.²⁰³ This section of Article XII purports to define all property subject to taxation. When construed with Section 2 it determines the extent to which the legislature may exempt property.²⁰⁴ It is totally unnecessary to define the property to be taxed, and much more reasonable to simply declare what property may not be taxed, thereby leaving it to the legislature to make its own determinations. No other constitution analyzed by this writer contains a similar provision. The Subcommittee also realized this provision to be a limitation on the legislature's power but was "not prepared to judge its adequacy."²⁰⁵ The Legislative Council concluded the section was adequate.²⁰⁶ This writer has concluded that it is a meaningless measure and that it should be removed from the Constitution.

¹⁹⁹MONT. CONST. art. XII, § 16: All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships and school districts.

²⁰⁰Subcommittee, *supra* note 90 at 10.

²⁰¹Legislative Council, *supra* note 2 at 61.

²⁰²Subcommittee, *supra* note 90 at 9.

²⁰³MONT. CONST. art. XII, § 17: The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stock of any company or corporation when the property of such stocks is within the state and has been taxed.

²⁰⁴Hilger v. Moore, *supra* note 13 at 169.

²⁰⁵Subcommittee, *supra* note 90 at 10.

²⁰⁶Legislative Council, *supra* note 2 at 61.

Section 18.²⁰⁷ This section is a "general grant of legislative authority."²⁰⁸ Since the legislature already has inherent power unless restrained by the state constitution or the federal constitution, this section is superfluous. This writer concurs with both the Legislative Council²⁰⁹ and the Subcommittee that the section should be deleted.²¹⁰

CONCLUSION

It is probably a safe assumption that the people of Montana do not want to become totally reliant on the federal government to provide the services, necessities and conveniences of modern life. Therefore, a need exists to provide for these items at the state and local level. The foundation for such self-help may now be created by the drafting of a simple, flexible, and modern revenue provision for the Constitution. "Although brevity itself is no guarantee of a good constitution, it is usually associated with the clarity and flexibility important in basic law."²¹¹ There are authorities who recommend that a state constitution should have no article at all on taxation, thus allowing the legislature and governor the utmost in flexibility.²¹² Practically speaking, it is doubtful that the voters would ratify a Constitution that left all taxation and finance power unchecked.

What should a state constitution contain? One point must be made clear. The convention must not become concerned with the tax structure *per se*, the arguments for or against the various taxes or the theories of property tax assessment. The constitution is to provide for sound policies, not theories and procedures. The best answer to the question in this writer's opinion was provided in the Subcommittee's report:

In its simplest form, the problem of what to include in the article on taxation and finance is a test of one's belief in our system of representative democracy. It is difficult to reconcile a position demanding a series of constitutional prohibitions or limitations upon the legislature's exercise of discretion in respect to taxation and finance with a real belief in democracy. Those who argue for constitutional checks are admitting a lack of belief in the capacity or desire of the elected representatives of the voters to establish and maintain an adequate and equitable system of financing public expenditures.²¹³

A more poignant observation is hard to imagine. With those comments in mind the following proposal is presented as a viable alternative to the present article on Revenue and Taxation.

²⁰⁷MONT. CONST. art. XII, § 18: The legislative assembly shall pass all laws necessary to carry out the provisions of this article.

²⁰⁸Subcommittee, *supra* note 90 at 14.

²⁰⁹Legislative Council, *supra* note 2 at 61.

²¹⁰Subcommittee, *supra* note 90 at 14.

²¹¹League of Women Voters, *supra* note 4 at 3.

²¹²*Id.* at 28 citing MODEL STATE CONSTITUTION at 91 (6th ed. 1968).

²¹³Subcommittee, *supra* note 90 quoting Kresky, SALIENT ISSUES OF CONSTITUTIONAL REVISION at 136-37 (1961).

REVENUE AND TAXATION

- § 1: The power of taxation shall never be surrendered, suspended or contracted away.
- § 2: Standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law.
- § 3: Taxes shall be levied and collected by general laws and for public purposes only.
- § 4: All taxes levied for state purposes shall be paid into the treasury, and no money shall be drawn therefrom but in pursuance of specific appropriations made by law.
- § 5: Exemptions from taxation may be granted only by general laws. Unless otherwise provided by law, all exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

This proposed provision has several advantages. It is devoid of any special interest influence. The revenue system under such an article could be planned in terms of the total state and local situation. There is no earmarking of any funds which inhibits budgetary planning. It would not tie the hands of the legislators in providing for capable, efficient and honest administration. The proposal would not be a document by which the convention delegates would rule the state from their graves or under which the judiciary would be required to establish state policy.

A taxation and finance article composed of these five sections would provide a sound basis upon which the elected representatives could respond to the wishes of the people of Montana.